NIFFIRA PERTANIA SDN. BHD.

v.

LEMBAGA KEMAJUAN JOHOR TENGGARA & ORS.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[CIVIL SUIT NO. 22-182-1989]
10 FEBRUARY 1990

CONTRACT: *Agreement for sale and purchase of land - Contingent condition - Whether liable in damages.*

LAND LAW: *Removal of private caveat liable in damages - Contingent condition in agreement - Approval of certain bodies - Effect of non fulfilment - Status of rights and obligations of parties - Caveatable interest - Section 327(1) National Land Code.*

The plaintiffs and the 1st defendant entered into an agreement for the purchase of oil palm and rubber plantations belonging to the 2nd and 3rd defendants. The agreement contained a clause in relation to the purchaser obtaining the approval and consent of various statutory and government bodies, one of them being the state government of Johore. After various negotiations and extensions of time, all consents and approvals were received except for the Johore State Authority. The defendants then purported to terminate the agreement and refunded to the plaintiff, the monies paid to date by the plaintiffs. The plaintiffs then entered a caveat on the register document of title.

The defendants applied for removal of the private caveat. The issue for determination was whether, on the given facts, the plaintiffs still had any caveatable interest in the lands.

Held:

[1] Relying on the authorities in this area:

a) the completion of sale of the said lands was contingent upon the defendants obtaining the approval of the Johore State Government.

b) the refusal of the Johore State Government had put an end to the agreement because of the non-fulfilment of one of the conditions under Clause 3.

c) therefore, the plaintiffs can no longer claim any right to such title or interest in the said lands.

[Defendants' application allowed with costs]

Editor's Note:
The plaintiffs have lodged an appeal to the Supreme Court.

Cases referred to:
Bachan Singh v. Mahindar Kaur [1956] MLJ 97
National Land Finance Co-operative Society Ltd.v. Sharidal Sdn. Bhd. [1983] CLJ (Rep) 282
Aberfoyle Plantations Ltd. v. Khaw Bian Cheng [1960] MLJ 47

Legislation referred to:
National Land Code 1965, ss. 323(1)(a), 327(1)

For the applicants/defendants - Ishak Mohd. Sharif
For the respondents/plaintiiffs - V.M. Mohan

JUDGMENT

Mohamed Dzaiddin J:

In this application the defendants prayed for the removal of private caveats from the register documents of title of their lands held under:

(a) HS(D) 3732 PTD No. 1097; HS(D) 3735 PTD No. 1099; HS(D) 3735 PTD No. 1429 all of Mukim Ulu Sungai Johor; HS(D) 1999 PTD No. 372 and HS (D) 1998 PTD No. 371 both of Mukim Pantai Timur;

(b) HS(D) 2852 PTD No. 973; HS(D) 2265 PTD No. 1113; HS(D) 2266 PTD 1114; all of Mukim Ulu Sungai Johor; HS(D) 2786 PTD No. 5675, Mukim of Kota Tinggi; HS(D) 2787 PTD No. 543 and HS(D) 2009 PTD No. 107 both of Mukim Sedili Kechil;

(c) HS(D) 2785 PTD 542 Mukim Ulu Sungai Sedili Besar;

("the said lands"), under s. 327(1) National Land Code and other consequential reliefs on the ground that the plaintiffs no longer have any cavetable interest in the said lands because of the refusal of the Johore State Authority to give consent to the defendants to the transfer of the said lands to the plaintiffs thereby putting an end to an agreement for the sale of the said lands dated 25 October 1987 ("the agreement") made between the plaintiffs and the defendants.

The Facts

Briefly, the facts are as follows. Sometime in February 1983 the plaintiffs commenced negotiations with the 1st defendant for the purchase of 18,604.7685 acres of oil palm and rubber plantations belonging to the 2nd and 3rd defendants. In November 1986 pursuant to the several negotiations the plaintiffs paid the 1st defendant a sum of 100,000 ringgit as earnest deposit. This was followed by payments of further sums of 400,000 ringgit on 7 March 1987, 300,000 and 1,700,000 ringgit on 12 August 1987. Following the payments of these deposits, the parties executed the agreement. For the present purpose, Clause 3.1 of the agreement is material. This clause states as follows:

> The provisions of this agreement are conditional upon and subject to the fulfilment of the following conditions;
>
> (a) The purchaser obtaining the approval of the F.I.C. and such other relevant authorities to the contents of this agreement.
>
> (b) The consent to transfer the said land to the purchaser being obtained from the Johore State Government by the vendor.
>
> (c) The approval of the Minister of Land and Regional Development being obtained by the vendor.
>
> (d) The surrender of the lease by the companies to the vendor.
>
> (e) All other relevant and necessary approvals for the completion of the sale.
>
> (f) The vendor shall assist the purchaser in obtaining all the necessary approvals required to be obtained by the purchaser and shall supply and provide all necessary information and particulars.
>
> (g) The vendor shall obtain and deliver all the relevant title deeds for the said land mentioned in the First Schedule prior to the completion period mentioned hereinafter and in pursuant to the terms and conditions herein, free from encumbrances except for the charge currently existing on the said land.

It is further provided under Clause 3.3 that if all or any of the conditions stated in Clause 3.1 was not satisfied within the period of six months (or for such longer period and upon such terms as the parties hereto may mutually agree), the rights and obligations of the parties will lapse and be of no further effect and all monies paid on account of the sale by the purchaser to the vendor would be returned to the purchaser free of interest and thereafter the parties would be released from further obligations under the said agreement. In view of the conditions precedent stipulated in Clause 3.1 several meetings were held between the parties as a result of which an extension of four months from the completion date was mutually agreed. Subsequently, on 29 June 1988 the plaintiffs's solicitors informed the defendant's solicitors that they have obtained approval of the loan for the purchase of the said lands. On 18 July 1988, the defendants' solicitors wrote to the plaintiffs' solicitors informing them that Bank Bumiputra Malaysia Berhad would require an undertaking from the plaintiffs' solicitors before executing the discharge of charge in respect of the said lands and the defendants were still awaiting approval from the Johore State Government on their application for consent to transfer the said lands to the plaintiffs. In the meantime, on 19 July 1988, the Foreign Investment Commitee (FIC) approved the plaintiff's application to purchase the said lands and on 22 August 1988 the plaintiffs' solicitors sent to the defendants' solicitors a letter of undertaking to be given to Bank Bumiputra Malaysia Berhad. However, at this point of time, the plaintiffs were still unable to complete the sale because the Johore State Authority had still not given its approval.

The plaintiffs and the defendants held further discussions, whereby on 4 October 1988 the plaintiffs agreed with the defendants that a further extension of four months be granted to enable the defendants to obtain the necessary approval in order to complete the sale. Then, to their surprise, the plaintiffs' solicitors received a letter dated 18 October 1988 from the defendants' solicitors giving notice to terminate the agreement with immediate effect pursuant to Clause 3.3. and/or Clause 11.2 of the agreement. Clause 11.2 provides that in the event of the vendor failing to perform any of its obligations under this agreement, or if the transfer of the said lands cannot, for reasons not attributable to the fault of the vendor or the purchaser, be duly registered, then, the purchaser shall be entitled to the refund of all monies paid free of interest and thereupon the agreement shall be deemed terminated. The defendants' solicitors also enclosed their clients' cheque for 2,500,000 ringgit being refund of the amount deposited with the defendants. Admittedly, no specific reason was given in the said letter for the termination of the agreement. It was only through the subsequent affidavit filed on 24 August 1989 by Puan Noorasikin that an explanation came to light *vide* an official letter from the Pengarah Tanah and Galian, Johor dated 10 January 1989, The letter reads as follows:

Sulit Tarikh: 10 Januari 1989

Pengurus Besar,
Kejora,
677, Jalan Petri,
Peti Surat 180,
80906 Johor Bahru.

(U.P. Encik Manfar bin Dato' Hj. Sairan)

Per: Pengswastaan Ladang Petrie Tenggara Sdn. Bhd. dan Pertanian Johor Tenggara Sdn. Bhd. Kepada Tetuan Niffira Bhd.

Adalah Saya Merujuk kepada perkara tersebut dan memaklumkan bahawa Majlis Mesyuarat Kerajaan di Mesyuaratnya pada 14 Disember 1988 (R/M974/88) telah **menolak** permohonan daripada KEJORA untuk menjual Ladang Petrie Tenggara Sdn. Bhd. dan Pertanian Johor Tenggara Sdn. Bhd. kepada Tetuan Niffira Berhad.

Sekian, terima kasih.

"Berkhidmat Untuk Negara"

t.t.

(Dato' Hj. Rahmat bin A. Rahman)
b.p. Pengarah Tanah dan Galian, Johor.

In short, the defendants' application to sell the said lands was rejected by the Johore Government. This was accordingly conveyed by the defendants' solicitors to the plaintiffs by a letter of 25 January 1989.

Conclusions

The sole and central issue in this application is whether, on the given facts, the plaintiffs still have any caveatable interest in the said lands. It is trite that the plaintiffs' interest in the said lands is derived from their contractual right with the defendants under the agreement and it follows that they come within the category of "any person or body claiming any right to such title or interest" in the said lands under s. 323(1)(a) National Land Code (*Bachan Singh v. Mahindar Kaur* [1956] MLJ 97). So long the contract is subsisting, the purchaser i.e. the plaintiffs obtain, by virtue of the agreement a right to a title to or interest in the said lands. However, under the agreement its completion is contingent upon the necessary approvals of the relevant authorities, e.g. the FIC, the Johore Government, the Minister of Land and Regional Development and the chargee bank. In fact, it was confirmed that both the FIC and the Minister of Land and Regional Development had given their consent and the chargee bank, Bank Bumiputra Malaysia Berhad had agreed to the execution of the discharge of charge upon an undertaking given by the defendants' solicitors. However, despite the above approvals, the most vital condition in the agreement was not met. I am referring of course to the refusal of the Johore State Government to give its consent to the defendants to transfer the said lands to the plaintiffs. What then is the effect on the agreement? In my opinion, Clause 3.3 becomes relevant, which states that where all or any of the conditions referred to in Clause 3.1 was not satisfied, the rights and obligations of the parties would lapse and be of no further effect and all monies paid would be refunded to the purchaser and the parties would be released from further obligations under the agreement.

In *National Land Finance Co-operative Society Ltd. v. Sharidal Sdn. Bhd.* [1983] CLJ (Rep) 282 the then Federal Court had the occasion to consider a a similar issue. There the plaintiff agreed to sell and the defendant to purchase certain immoveable property. It was the condition of the agreement that the sale should be subject to the approval of the FIC. The application to the FIC was accordingly made by the plaintiff. Consequently the FIC refused to grant its approval. The plaintiff's solicitors informed the defendant's solicitors that their application was rejected by the FIC and as the intended sale could no longer be proceeded with, they were instructed to terminate the sale agreement. The plaintiff followed this matter up by making an application to the High Court praying, *inter alia*, for a declaration that the agreement was void when the FIC did not approve the sale. Wan Hamzah J (as he then was) made an order declaring that the said agreement became void when the FIC disapproved the sale. The defendant then appealed to the Federal Court and the principal issue was whether the sale agreement became void on the date when the FIC rejected the sale. Salleh Abas CJ (Malaya) (as he then was), in delivering the judgment of the Court agreed with Wan Hamzah J and held that the agreement became void because of the refusal of the FIC to approve the sale over which neither the plaintiff nor the defendant had control. In the course of his

judgment, the learned Judge discussed the case of *Aberfoyle Plantations Ltd. v. Khaw Bian Cheng* [1960] MLJ 47 which I feel is on all fours with the present case. In that case, there was a condition in a sale agreement that the completion of the sale of the land was conditional upon the vendor obtaining the renewal of the lease which was the subject matter of the sale, from the State Government. Their Lordships of the Privy Council held that such a condition was a contingent condition. A contingent condition is "a provision in a contract to the effect that the contract shall not take effect unless and until the condition is fulfilled, and the non-fulfilment of the condition does not render either party liable in damages to the other." (per Salleh Abas CJ (Malaya) in *National Land Finance* (*supra*) at p. 290). He went further to state that the requirement for the FIC approval belongs to the category of contingent conditions the non-fulfilment of which negates the existence of any contractual relationship between the parties to complete the agreement.

Relying on the above authorities, in my judgment, the completion of sale of the said lands was contingent upon the defendants obtaining the approval of the Johore State Government. Hence, the refusal of the Johore State Government had put the agreement to end because of the non-fulfilment of one of the conditions under Clause 3.1 of the agreement. In the result, the plaintiffs can no longer claim any right to such title or interest in the said lands. In another word, the plaintiffs ceased to have any caveatable interest in the said lands. For these reasons the defendants' application was allowed with costs.

Also found at [1990] 2 CLJ 648